



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 8, 1995

Ms. Barbara B. Deane
Administrative Law Judge and
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR95-366

Dear Ms. Deane:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26828.

The Texas Department of Agriculture (the "department") has received a request for information concerning certain Texas Agricultural Finance Authority ("TAFA") loans made to Highland Foods Company. Generally, the requestor seeks "any and all information available through the Texas Department of Agriculture and/or Texas Agricultural Finance Authority on Highland Foods." You claim that sections 552.101 and 552.110 of the Government Code except some of the requested information from required public disclosure. You also state that "we will withhold from disclosure all requested information until such time as Highland and/or the lender have filed any objections they may have."

At the outset, we address your assertion that section 552.101 excepts some of the submitted information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that federal law makes confidential tax return information provided by Highland to the department. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms); 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989), *aff'd*

in part and vacated in part on other grounds, *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Accordingly, the requested information must be withheld from required public disclosure under section 552.101 of the Government Code to the extent that it contains tax return information made confidential by federal statute.

You also assert that section 552.101 in conjunction with federal law makes certain social security numbers confidential. As you note, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). See Open Records Decision No. 622 (1994). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). We note that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990. For example, an employer is required to obtain a new employee's social security number for tax purposes under a law that predates October 1, 1990, and thus, a social security number obtained under this law is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers at issue here are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number contained in these documents, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990.

Finally, you assert section 552.101 in conjunction with common-law privacy doctrine. Information must be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* is of no legitimate concern to the public.

In Open Records Decision No. 373 (1983), this office concluded that

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

In addition, disclosure of personal financial information about an individual is ordinarily of no legitimate concern to the public, but special circumstances may overcome the presumption. *See id.* at 3; *see also* Open Records Decision Nos. 545 (1990), 523 (1989). On the other hand, transactions involving loans to individuals made or guaranteed by governmental bodies are matters of legitimate public interest, and thus are ordinarily not within the protection of common-law or constitutional privacy. Open Records Decision No. 590 (1991) at 3; *see also* Open Records Decision Nos. 525 (1989), 480 (1987), 385 (1983). Thus, this office distinguishes between "basic facts regarding a particular financial transaction between the individual and the governmental body" and "background financial information furnished to a public body about an individual." Open Records Decision No. 590 at 3. Accordingly, the availability of "personal financial information" should be addressed on a case-by-case basis. *See also* Open Records Decision Nos. 600 (1992) (excepting information relating to a government employee's participation in optional life insurance plan); 545 (1990) (public employee's personal investment decisions regarding a deferred compensation plan are ordinarily protected by common-law privacy).

In the instant case, we understand that an applicant for TAFE loan guarantees is required to submit historical balance sheets, income statements, and cash flows for a specified period of time. In addition, the applicant must also provide historical information for the principal owners of the business. You seek to withhold under common-law privacy certain documents that the department requires applicants to submit as part of their application for TAFE loan guarantees, including applications for life insurance policies for certain individual officers or employees of the borrower (Exhibit "A"); several memoranda which discuss the employment status of certain individual officers or employees of the borrower (Exhibit "B"); and copies of personal financial statements of certain individual officers or employees of the borrower (Exhibit "C"). The information included in exhibits "A" and "C" constitutes "background" financial information regarding particular individuals and is therefore intimate or embarrassing. In this case, there has been no demonstration of a legitimate public interest adequate to justify the invasion of the individuals' privacy with respect to exhibits "A" and "C". Accordingly, the department must withhold exhibits "A" and "C" from required public disclosure in their entirety under section 552.101 of the Government Code. We conclude, however, that the portions of Exhibit "B" that you seek to withhold under common-law privacy are not intimate or embarrassing and therefore may not be withheld from required public disclosure under section 552.101.

We now address the remainder of the asserted exceptions. Pursuant to section 552.305(c) of the Government Code, we notified the company whose interests may be affected by disclosure of the information submitted to us for review. In response, we received a letter from attorneys representing Highland Industries, Inc. ("Highland"). Highland contends that the requested information is protected from disclosure by sections 552.101, 552.104, and 552.110 of the Government Code.

We turn first to section 552.104. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither the department nor the respondent indicates how the requested information relates to a competitive bidding situation or commercial transaction to which the department is party. Accordingly, section 552.104 does not except from required public disclosure the information at issue here.

Next, we turn to section 552.110. At the outset, we note that we do not address the applicability of section 552.110 to the information that the department must withhold pursuant to section 552.101. Thus, the discussion of section 552.110 is limited to the remaining information submitted for our review. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.*

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). This office has previously held that if a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.¹

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

Highland addresses the Restatement criteria, but only in conclusory fashion. Highland also notes that courts have protected parties from the involuntary disclosure of the type of information at issue here on financial privacy grounds and because release of such information would have a detrimental effect upon a party's competitiveness in the marketplace. We note, however, that the right to privacy is designed to protect the feelings and sensibilities of human beings rather than to protect business interests. *See* Open Records Decision Nos. 625 (1994), 192 (1978). As indicated above, common-law privacy protects from disclosure only the background financial information concerning Highland's principal owners, not that of the company itself. Highland has not cited, nor are we aware of, any authority that specifically governs the remaining information submitted for our review.² Information may not be withheld under the "commercial or financial" branch of section 552.110 unless it is "privileged or confidential" under the common or statutory law of Texas. *See* Open Records Decision No. 592 (1991). We conclude that Highland has not made a prima facie case establishing that the remaining information constitutes "trade secrets" and has not referred us to any state judicial decision or statute holding such information either privileged or confidential as a matter of law. Accordingly, we conclude that the department may not withhold the remaining information under section 552.110 of the Government Code.

(Footnote continued)

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

²Highland also appears to claim that the requested information is made confidential by the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et. seq.* The federal Right to Financial Privacy Act, however, regulates only the release of financial records by financial institutions to the federal government, and consequently, is inapplicable to the release of records by a Texas state agency under the Open Records Act. *See* 12 U.S.C. §§ 3401(3), 3402 - 03.

In conclusion the department must withhold Exhibit "A", Exhibit "C", and any "tax return information."³ However, the department must release the remaining information in Exhibit B. In addition, the department must release to the requestor, if it has not already done so, any other information related to the request that was not submitted to this office for review. Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 26828

Enclosures: Submitted documents

cc: Mr. Charles L. Black
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(w/o enclosures)

³The requestor argues that none of the requested information may be withheld, relying on a 1993 ruling from this office to the department which concluded that similar information requested from a different company was subject to disclosure with the exception of some trade secrets. We note, however, that *Open Records Letter No. 93-059 (1993)* dealt in part with the personal financial information of the owner of a sole proprietorship. Generally, a sole proprietorship has a legal existence only in the identity of its owner. *Ideal Leas Service, Inc. v. Amoco Production Co.*, 662 S.W.2d 951, 952 (Tex. 1983). Therefore, the owner is personally liable for the debts of the sole proprietorship. See *Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 170 (Tex. 1992) (holding that, with regard to contracts, members of an unincorporated association who incur debt on behalf of the association are personally liable). We believe that, as *Open Records Letter No. 93-059* concluded, there is a legitimate public interest in the personal financial information of the owner of the sole proprietorship as he may be personally liable for its debts.

On the other hand, an officer of a corporation is generally not personally liable to corporate creditors. See 15 TEX. JUR. 3D *Corporations* § 289. In this case, the requested information includes personal financial information of the president and vice president of Highland Industries, Inc. We believe that there has been no showing of legitimate public interest sufficient to overcome the individual's privacy in this information, since the officers would not ordinarily be liable for any loans made or guaranteed by TAFE.